SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1966

No. 860

BROTHERHOOD OF SLEEPING CAR PORTERS,
PETITIONER,

versus

FRED THOMPSON, RESPONDENT

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT

Thompson went to work for the railroad in 1946 as a porter. During each and every year thereafter until the year 1956 when he finally prevailed upon the defendant to secure him a hearing, he made runs as a mail porter and as a train porter. He was never given his seniority as a mail porter until 1956, despite protests made each and every year commencing in 1950 and continuing through 1956.

Porters are not hired into a "regular" assignment but instead worked off of an "extra" board standing for extra runs in order of seniority. Thompson did not receive a "regular" assignment until 1953. That is, if, as was the case, there were four regular train runs every day and there were six men on the roster, only the top four men in seniority would be assured of regular employment, and the rest would have to stand for "extra" or "non-regular" runs off of the extra board.

Both the 1944 Agreement and the 1954 collective bargaining agreement between the Atlantic Coast Line Railroad and defendant union permitted a given employee the right to establish seniority on both the train porters roster and the mail porters roster. For an illustration of how this worked, see the 1953 and 1957 mail and train porters seniority rosters. In 1953 Reed and Anderson had seniority on both rosters, and in 1957 Curry, Reed, Thompson, Anderson, Singletary, Maxwell and Andrews had seniority on both rosters.

The 1944 Agreement, Rule 2 (c), provided: "Separate seniority rosters will be prepared for each classification . . . Seniority of each employee shall begin as of the date of employment in his respective classification . . ." Rule 4 of the 1944 Agreement provided: "Mail porters promoted to the position of train porter will retain seniority as mail porter, and when displaced as train porters in reduction of forces, will be privileged to displace mail porters their junior in service as mail porters, and will retain their seniority as train porters . . ."

The 1954 Agreement contained essentially the same seniority provisions except that their operation was spelled out in more detail. Both agreements provided that the rosters would be "posted" in January of each year. This was never done. Protest of any roster had to be made "within 60 calendar days of the date of posting." Thomp-

son began protesting in 1950. He also protested in 1951, 1952, 1953, 1954, 1955 and 1956. Between the time Thompson began protesting and 1956 when action was finally taken eight porters junior in point of service to Thompson were given seniority as mail porters ahead of Thompson and six of the eight were also given seniority as train porters. Four of the six who were given seniority as both train and mail porters had their dual seniority conferred before the 1954 Agreement was executed.

Thompson testified and produced cumulative correspondence from union officials to the effect that they refused to help him establish his seniority because he was not a member of the union. In 1957 Thompson was finally designated as the tenth and last man on the roster, and in the last two years thereafter that he remained on the roster he was never called for work. The difference in being number two and number ten was tantamount to a complete loss of seniority or discharge. The only other regular employment Thompson was able to obtain was as a janitor. He is still employed as a janitor.

In paragraph 3 of the prayer of the complaint (as amended) plaintiff asked that the Court "Award plaintiff actual damages in the amount of $200,000.00 for damages that have accrued to date and that will accrue in the future."

REASONS FOR OPPOSING THE WRIT

1. The decision of the Court of Appeals does not cast any new or unreasonable burden on the union.

Petitioner's argument in support of granting the Writ is that the Circuit Court's decision unduly restricts the Union in the exercise of its right to exercise reasonable discretion in handling employee grievances. Petitioner says that the Circuit Court "unduly restricts" and "penalizes"

when it "affirms the imposition of liability simply because there is reasonable ground for a jury to have come to a decision as to Respondent's claim different from that at which the bargaining agent arrived" and in support of this argument quotes from the opinion of Judge Sobeloff below: "From our reading of the record we also think that it was a jury question whether the union in 1956 should have supported Thompson's claim for seniority as of 1953 . . ."

Judge Sobeloff wrote the opinion for the Circuit Court in both appeals below, and his own words show that the Fourth Circuit does not impose on a collective bargaining representative the "intolerable" risk and burden suggested by petitioner. Judge Sobeloff correctly stated the rule in his first opinion (316 F. (2d) 191, 4th Cir. 1963):

"But, any discrimination in treatment must be based upon relevant, non-invidious distinction for, while '(a) wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, (it is) subject always to complete good faith and honesty of purpose in the exercise of its discretion.'"

This Court in *Humphrey v. Moore,* 375 U. S. 335, 11 L. Ed. (2d) 370, 84 S. Ct. 363, has indicated the guidelines applicable to cases involving alleged breaches of the duty of fair representation:

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman,* 345 U. S. 330 at 338, 97 L. Ed. at 1058.

The charge of the trial judge in the District Court below gave strong emphasis to this considerable latitude given the union in handling grievances. Here are relevant extracts from Judge Hemphill's charge (emphasis mine):

"I charge you that the duty of fair representation of the Brotherhood to Train and Mail Porter—the Defendant asked me to charge you this—covered, likewise requires fair representation to others—of all, and the Brotherhood could not arbitrarily displace a senior with one junior." (P. 599, Tr.)

"I charge you that the Brotherhood is not obliged to adopt any individual's interpretation of the Bargaining Agreement and the rights thereunder, at his request. **It must exercise its own fair judgment,** subject to the requirement that it forbear from hostile discrimination against any person; that is, the Brotherhood must not act against any person from malice.

"I charge you that in order for the Plaintiff to recover, he must first prove that there was merit in his claim to mail porter seniority. If he was in fact not entitled to it, then he cannot complain because he was not given it and whether the Defendant represented him fairly or unfairly in his claim is immaterial except that I charge you in that connection: **It is a question of reasoning, a question of reasonableness, a question of good faith and honesty.** Did the Plaintiff show that he received different or substantially substandard representation at the hands of the Defendant? If so, was it because of some improper reason such as his unsatisfacory union status? Did this treatment cause him injury? (P. 601, Tr.)

"I charge you, that fair representation—the Defendant asked me to charge this—does not require that the Brotherhood agitate endlessly at the instance of any employee who may consider himself aggrieved. **The Defendant has a wide range of discretion within which to decide whether or how far a particular claim warrants prosecution.** I therefore charge you that if the Brotherhood was acting in good faith in concluding that the Collective Bargaining Agreement relating to seniority did not require the railroad to put Plaintiff on the Mail Porters' seniority roster with seniority date earlier than 1956, the Plaintiff cannot recover." (P. 601, Tr.)

In Judge Sobeloff's second opinion (the subject of this petition for a writ), he cites *Humphrey v. Moore* as authority. In his first opinion, Judge Sobeloff took counsel for both parties to task because "There (was) no adequate discussion of the considerable body of law relating to the federal cause of action for breach of a union's duty of fair representation." *Thompson v. Brotherhood of Sleeping Car Porters,* 316 F. (2d) 191 at 197.

The delicts of the Union in this case were shocking. The Union did not even bother to try to conceal the motive for its hostile discrimination. B. F. McLaurin, Eastern Zone Organizer and Defendant's chief witness was explicit as to the reason the Union did not help the Plaintiff—he was not a member of the Union, and he was one of the "dissident" non-union employees. The Plaintiff proved his case with a "trunkful" of documents, letters, memoranda, and exhibits. The testimony of A. J. Pringle, Local Chairman, and the cross examination of Joe Green, former local chairman, explicitly established the fact of discrimination, as well as the invidious, non-relevant motive for it—non-union status. The Union never did during either trial nor on either appeal explain why other porters were given their seniority and the Plaintiff was not.

Judge Sobeloff summarized Plaintiff's proof that required submission of the question of unlawful discrimination to the jury (Page 46 of Petition):

Thompson was not a regular, dues-paying union member. He became associated with the union for a brief period sometime in 1951 or 1952, but later withdrew because, as he testified, the union did not vigorously press his claim for seniority. He rejoined the Brotherhood in 1956, at a time when the company was phasing out his train porter position.

Before the 1956 meetings, B. F. McLaurin, International Field Organizer of the Brotherhood, addressed a letter to Thompson, dated May 8, 1956:

> "I am sure you were aware that there was nothing I could do until you became a full fledged member; now that you have followed through on your responsibility, rest assured that we will do the same at this end. I have instructed your local chairman to request a formal hearing on your case. I trust that you will cooperate in every way possible to get this case started in order that we may be able to process it into the Railroad." (Emphasis supplied.)

Coupled with the testimony of A. J. Pringle, former Secretary-Treasurer of the Local, that Thompson could not expect the strong support of the Brotherhood unless he were a member in good standing, McLaurin's letter is more than sufficient to require submission of the question of unlawful discrimination to the jury.*

The Fourth Circuit Court of Appeals has enunciated no principles in either opinion contrary to the rules laid down in this field by this Court. Both the charge of the trial judge and the opinions of Fourth Circuit are well inside the circumferential ambit of the *Humphrey v. Moore* guidelines.

2. The Decision of the Court of Appeals is not in conflict with the applicable decisions of this Court.

This Negro porter had certain rights that were not protected. He sued the Union malefactor and did not elect to join the railroad; nor did the Defendant elect to join the railroad. Plaintiff prayed for future damages because

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* Another revealing letter from McLaurin, dated November 23, 1954, and addressed to all train porters, contains the following language:

> "It is a well-known fact that porters are off their jobs today who ordinarily would be working if they had been members in good standing in the organization."

his whole career—the only one really available to him at this wage level—had been maliciously destroyed by the Defendant union. The judge charged future damages, and the jury brought in a verdict for substantial damages, including future damages. Defendant has not questioned the amount of the award but argues that our decisions do not permit an award of damages beyond the date of the final judgment.

In *Wicker v. Hoppock,* 73 U. S. (6 Wall.) 94, 18 L. Ed. 752, this Court stated the foundation rule of damages: "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury."

However, until recently, practically everyone, including the courts and especially the commentators, concluded that labor relations law was a very special creature of statute. Majority rule and rights were the order of the day. The individual employee became the acknowledged sacrifice to this concept. The commentators agonized in law review article after law review article over the plight of the individual under old case law and modern labor statutes and generally concluded that the individual has very few rights except insofar as he comprises a part of the mass; anyway he has few court recognized remedies for violated rights in this area and the courts have had to find new bottles for new wine—the new wine being those decisions securing certain rights to the individual employee. *Steele v. Louisville & N. R. R.,* 323 U. S. 192 (1944), decreed the duty of fair representation. *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448 (1956), mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations. *John Wiley & Sons v. Livingston,* 376 U. S. 543 (1964), establishes that seniority rights do not necessarily termi-

nate at the expiration of the collective bargaining agreement.

The following cases are spiritual predecessors if not legal precedents affirming the proposition that the courts under proper circumstances will secure rights and provide effective remedies therefor extending beyond the term of the agreement from which those rights derive: *Zdanok v. Glidden Co.*, 288 F. (2d) 99, 99 A. L. R. (2d) 965, affirmed 370 U. S. 530, 8 L. Ed. 671; *Giordano v. Mack Trucks, Inc.*, 203 F. Supp. 905 (D. N. J. 1962); *Piano and Musical Instrument Workers Union Local 2549 v. W. W. Kimball Co.*, 221 F. Supp. 461 (N. D. Ill. 1963); *United Shoe Workers v. Brooks Shoe Manufacturing Co.*, 187 F. Supp. 509 (E. D. Pa. 1960); and *Wiley & Sons v. Livingston, supra.*

The decisions just cited, as well as the decision in this case, confirm that the lower courts are actively engaged in process of interfusing statute-weighted labor relations law with rights-conscious Anglo-American jurisprudence. No court or body is more aware than this Court that labor relations law has, so far as the individual employee is concerned, constituted a frustration for the individual and a dilemma for the courts. This decision is a true legal and equitable descendant of *Lincoln Mills* and *Steele v. Louisville & N. R. R.* This case and the others like it are steadily removing the hiatus in the law as it relates to the rights of the individual employee. The elan vital of the labor relations statutes will not be destroyed by decisions like this extending time-honored legal remedies to this heretofore barren area of labor relations law. This case accords with the vital considerations of this Court as expressed in *Humphrey v. Moore.* No judge or right-minded person is against providing remedies where there are rights—if those remedies are not of such a nature that they threaten some absolutely vital process in our social order, such as the collective bargaining process in labor relations, but even

the most cursory analysis discloses that the spectre of industrial strife does not hang over (litigation) of individual complaints where the controversy is solely between the individual and his malfeasant representative and does not bring the two giants themselves into conflict.

Why is it important that this case be let live? This case stands for the proposition that a union will have to represent all of its members on a non-discriminatory basis or expose itself to an action for damages in which the measure of damages is coextensive with the injury inflicted. Neither the Plaintiff nor the Brotherhood saw fit to join the Company-employer, and significantly there was not the slightest impact on relations between the Union and the Company-employer as a result of this case.

A careful reading of the record will confirm that this verdict is what this representative needs to make it act responsibly.

Sanford J. Rosen, writing in Vol. 15, page 391, Hastings Law Journal, "Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining", points out that "in reality, unions are now themselves being sued by individuals with no apparent crippling effect to their treasuries or to their general usefulness to the workers. (Footnote 173, *ibid.*: In 1957 the income of labor unions in the United States reached about $620,000,000. 187 Economist 703 (1958).)

In this article, Mr. Rosen points up the scant protection afforded the individual employee under the judicial process (Quoting, page 399, May 1964):

> "While it is now clear that labor unions, and consequently union officers and officials, owe those whom they represent a fiduciary duty of fair representation, unfortunately the protection afforded is less than apparent. (Citations.)

"Initially, there are limitations inherent in the judicial character of the protection. To gain relief an expensive law suit must be conducted—this usually out of the question for all but especially outraged workers. (Citations.) Such a law suit, in addition, is likely to be so time consuming as to dissipate real enjoyment of the fruits of any ultimate victory. (Here in footnote 39, the author cites a quote from the opinion of Judge Sobeloff in the instant case—315 F. 2d, 192 n. 1):

" 'We note the unhappy fact that the litigation was begun more than four years ago, etc.' (It has now been more than eight years since this litigation was begun.) (Continuing the Rosen article): In addition, a number of courts have compounded the general limitations incident to the judicial character of the remedy by imposing 'numerous procedural and technical barriers which tend to restrict effective protection of employees.' (Citations.) The effect of these limitations is quite significant. A commentator who communicated with the attorneys of record, in the reported fair representation cases involving alleged racial discrimination, as to the present status or ultimate disposition of each case has concluded that:

> "In theory, the doctrine of fair representation assures Negroes that their jobs cannot be affected by unfairness on the part of their collective bargaining representatives. In fact, Negro workers have made extremely limited use of judicial coercion under the *Steele* standard; and when they have tried to take advantage of its apparent protection, they have secured only slight practical amelioration of their position."

"In non-racial cases, effective use of the judicial protection appears to be even more limited. As already noted, some courts were initially reluctant to extend the duty to cases other than those involving racial affronts. By now, however, it is clear that the obligation does extend to non-racial abuses of union power. (Citations.) Yes, in only a very few cases have ag-

grieved parties won court decisions on the merits when unfair representation of a non-racial origin has been alleged. (Citations.)

"The judicial tendency to circumscribe availability of the remedy and the reluctance to extend the duty to prohibit non-racial injuries reflects a continuation of the general judicial attitude against intervention in the sphere of private associational power and organization. Criticism has been leveled at the courts for being unwilling 'to discard the doctrine of non-interference in the internal affairs of "voluntary organizations" even in applying the explicit statutory protection of Title I, "The Bill of Rights" provisions, of the Labor Management Reporting and Disclosure Act of 1959'." (Citations.)

If *Lincoln Mills* is to have continuing vitality judicial inventiveness must be given a chance. This decision should be let stand for the present in any event. It is, under its special facts, an expansion of remedy for the individual employee. Certainly, in this arid area of the law this one little bloom should not be stamped out aborning. Decisions have been few and far between in this area and to deny this one at least the tentative or temporary sufferance promised in *Lincoln Mills* would inhibit further judicial inventiveness in this area. It would appear that when as now the courts have fashioned an expanded remedy in this area of labor relations law, this Court should hesitate to even note its existence until it has had an opportunity in its own good time to prove whether it is a sport or a firmly implanted seedling that along with other decisions in this area will expand legal remedies available to employees and will promote increased responsibility on the part of bargaining agreement representatives.

Again it is emphasized that a suit for money damages in which the employee is pitted solely against his alleged delinquent representative cannot when so separated from

the vital bargaining process itself disrupt or impede the bargaining process. The decisions of the courts has reflected the concern of everyone for the health of the bargaining process which must be promoted and protected until it has achieved optimum stability, maturity, and flexibility, but this case itself is good evidence that the employee can still be protected and provided a plenary remedy without in any degree creating discord between the Union and management.

This case is in accord with the lines of authority and principles laid down in the *Steele, Lincoln Mills, Humphrey v. Moore, Zdanok v. Glidden* and *Wiley v. Livingston* cases above. Therefore, the Writ should be denied.

Respectfully submitted,

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